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August 10, 2004

Mr. Jeff S. Jordan, Esq., Supervisory Attorney
Federal Election Commission
999 E Street, NW
Washington, D.C. 20463

RE: MUR 5475
In re Nader for President, et al.

Dear Commissioners and Mr. Jordan:

Pursuant to 11 C.F.R. § 111.6(a), Respondents Oregon Family Council (OFC), Timothy Nashif, and Michael White submit the following memorandum in support of dismissal of the above complaint in relation to these Respondents.

INTRODUCTION

In late June 2004, OFC volunteers contacted other Portland, Oregon area OFC members to inform them of a significant, upcoming political event in Oregon—namely, the rally to get Ralph Nader's name on the presidential ballot in Oregon. Benefits to any outside campaign from this internal discussion are, by definition, neither contributions nor expenditures. Furthermore, the OFC volunteers at issue here were discussing political events with fellow members, and thus fall wholly within the ambit of First Amendment protections on core political speech. The complaint is unwarranted and should be dismissed against Respondents OFC, Nashif, and White.

Internal communications within a political advocacy organization are not in-kind contributions to any campaign. No outside group was given access to OFC's phone list, and OFC did not raise funds for any federal candidate through its communications among its members. In performing what amounted to internal voter education among its members, OFC acted wholly within its rights under the First Amendment and made no contribution—in-kind or otherwise—to any federal election campaign.

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FACTUAL BACKGROUND

OFC is an Oregon non-profit public benefit corporation dedicated to informing its membership about political issues that impact religious Christians. *See Declaration of Michael White* at ¶ 2 (attached as Exhibit 1).¹ At some time around June 20, 2004, Petitioner Michael White received a telephone call from a member of either Citizens for a Sound Economy or the Oregon Republican Party about increasing turnout at a rally scheduled for June 25, 2004, to put Ralph Nader's name on the ballot for the upcoming presidential election. *Id.* at ¶ 3. Petitioner White is unable to recall which group in particular contacted him. *Id.*

Petitioner White was out of the Portland, Oregon area at the time, and coordinated the informing of OFC "members" with Nick Graham. *Id.* Petitioner White and Mr. Graham developed a "script" for calls placed to OFC members informing them of the Nader rally. *Declaration of Michael White* at ¶ 4; *Declaration of Nicholas Graham* at ¶ 3 (attached as Exhibit 2). Neither Petitioner White nor Mr. Graham were being paid for these efforts. *Declaration of Michael White* at ¶ 5; *Declaration of Nicholas Graham* at ¶ 2. On the evening of June 20, 2004, after being informed of the Nader rally and assisting in the development of the script, Mr. Graham created a Portland, Oregon OFC member list from the OFC database and placed that call list in the automated call system. *Declaration of Nicholas Graham* at ¶ 3.

On the evening of June 20, 2004—and on that evening alone—Mr. Graham arranged for calls to be placed to Portland, Oregon area OFC members to inform them that the Nader rally was taking place in Portland, Oregon on June 27, 2004. *Declaration of Nicholas Graham* at ¶ 4. Approximately 100 calls were made to Portland, Oregon OFC members, and no calls were made to any person outside the OFC member list. *Id.* at ¶ 4. The calls were made from phones and space neither belonging to, nor rented by, OFC or any other Respondent, and the OFC phone list was not rented or given away to any group or individual. *Id.* at ¶ 3.

Respondent Nashif was in Colorado during the events at issue in this complaint, and he was not involved in any way in the coordination or making of the phone calls. *See Declaration of Timothy Nashif* at ¶ 3 (attached as Exhibit 3)

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¹ OFC is not a membership organization, but it has a number of individuals it loosely terms "members"—*i.e.* donors and activists who are kept informed of political developments of significance to Oregon Christians. *Declaration of Michael White* at ¶ 2. This Response will use the term "members" in connection with these OFC donor/activists.

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RESPONSE TO COMPLAINT

Under the facts as outlined above, Respondents OFC, White, and Nashif committed no violations of the Federal Election Campaign Act, 2 U.S.C. 441b, for two reasons. First, phone calls arranged by volunteer members of an organization to other members of the same organization is by definition not a contribution or expenditure under the statutes. 2 U.S.C. 441b(2); 2 U.S.C. § 431. Second, assuming for the sake of argument that the telephone calls constituted some type of contribution as alleged in the complaint, the calls fall within the protections of the First Amendment for campaign speech by a non-profit corporation to its own members. See *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986).

I. THE ACTIONS OF OFC VOLUNTEERS DO NOT CONSTITUTE A CONTRIBUTION UNDER FEDERAL ELECTION LAW.

The complaint brought against Respondents alleges that Respondents violated 2 U.S.C. § 441b by making illegal in-kind contributions to the Nader for President campaign. *Amended Complaint* at 4. The complaint notes the definition of "contribution" as "any gift, subscription,, loan, advance or deposit of money or anything of value" under 2 U.S.C. § 431(8)(A)(i), including in-kind donations of goods and services under FEC regulations, 11 C.F.R. § 100.2(d)(1). However, the complaint fails to note that the statute further defines what a "contribution" *is not* —that "the term 'contribution' does *not* include":

(i) the value of services provided without compensation by any individual who *volunteers* on behalf of a candidate or political committee;

...

(vi) any payment made or obligation incurred by a corporation or a labor organization *which, under section 441b(b) of this title, would not constitute an expenditure* by such corporation or labor organization.

2 U.S.C. § 431(8)(B)(i), (vi) (emphasis added). In the first instance, even granting the complainant's argument that the OFC volunteers were working on behalf of the Nader campaign, any time spent by volunteers in this matter cannot be considered to be a contribution under 2 U.S.C. § 431(8)(B)(i). Furthermore, under 2 U.S.C. 441b(b), anything not qualifying as an expenditure cannot constitute a contribution. 2 U.S.C. § 431(8)(B)(vi). Because the phone calls are by definition not expenditures, they cannot be contributions.

An "expenditure" under 2 U.S.C. 441b(b)(2) is defined in pertinent part as "a contribution or expenditure as defined in section 431 of this title, and also . . . any thing of value . . . to any

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candidate . . . in connection with any election[.]” 2 U.S.C. 441b(b)(2). Turning first to the section 431 definition of expenditure, “the term ‘expenditure’ does *not* include

(iii) any communication by any membership organization or corporation to its members, stockholders, or executive or administrative personnel, if such membership organization or corporation is not organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office[.]

2 U.S.C.A. § 431(9)(B). Unpacking this exclusion in a careful fashion, it is plain from the facts submitted that OFC is a corporation that was communicating through its is not “organized primarily for the purpose of influencing the nomination for election, or election, of any individual to Federal office.” OFC’s primary purpose is to educate Oregon Christians about political matters important to Oregon Christians. *See Declaration of Michael White* at ¶ 2. Phone calls by a non-profit, public benefit corporation to its members constitutes an exempt communication under the Section 431 definition of “expenditure.”

The remainder of the 2 U.S.C. 441b(b)(2) contribution definition—*i.e.* “any thing of value . . . to any candidate . . . in connection with any election[.]”—tracks the Section 431 definition almost verbatim, and therefore does not bring the telephone calls by OFC member-volunteers to other members within the ambit of Section 441b’s prohibition on corporate contributions.²

² The use of the phrase “in connection with any election” also raises the question of whether the Nader rally—organized solely to place him on the Oregon *ballot*—constitutes an “election” within the statutory meaning of the term. Under 2 U.S.C. § 431(1), the term “election” means:

- (A) a general, special, primary, or runoff election;
- (B) a convention or caucus of a political party which has authority to nominate a candidate;
- (C) a primary election held for the selection of delegates to a national nominating convention of a political party; and
- (D) a primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

2 U.S.C. § 431(1)(A)–(D). The rally was not a nominating convention in the sense of a political party nominating a candidate, 2 U.S.C. § 431(1)(B), nor was it a primary election for the nomination of a slate of electors or individual candidates, 2 U.S.C. § 431(1)(C), (D), nor was it “a general, special, primary, or runoff election,” 2 U.S.C. § 431(1)(A). Quite simply, the phone calls made by OFC volunteers were not made in connection with any “election” as defined in 2 U.S.C. § 431.

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Under caselaw interpretation as well, the phone calls encouraging OFC members to attend the Nader rally to place his name on the ballot falls short of the "express advocacy" required to trigger the regulation of an "expenditure in connection with any election" under Section 441b. Under *Buckley v. Valeo*, 424 U.S. 1, (1976), and *Federal Election Comm'n v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238, the Supreme Court held that "an expenditure must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." *MCFL*, 479 U.S. at 249. Expounding upon the term "express advocacy," the Court noted that:

Buckley adopted the "express advocacy" requirement to distinguish discussion of issues and candidates from more pointed exhortations to vote for particular persons. We therefore concluded in [*Buckley*] that a finding of "express advocacy" depended upon the use of language such as "vote for," "elect," "support," etc.

MCFL, 479 U.S. at 249, citing *Buckley*, 424 U.S. at 44, n. 52. There is no argument that the "script" complained of here in any way advocated voting for Ralph Nader for President of the United States.³ Because the phone calls contained no express advocacy, they could not be considered expenditures under Section 441b(b)(2). Furthermore, *MCFL* held that even though the non-profit advocacy corporation in *MCFL* engaged in express advocacy through expenditures, such expenditures could not be restricted in light of the First Amendment.⁴ *MCFL*, 479 U.S. at 259–60.

Therefore, because the phone calls cannot be considered expenditures, they cannot be considered contributions due to the exclusion contained in 2 U.S.C. § 431(8)(B)(vi). The phone calls were neither contributions nor expenditures under the statutory definitions of these terms. Therefore, it has been amply demonstrated that neither the phone calls nor the volunteer time are contributions under the pertinent statutes, and OFC did not release its internal member list to any other organization.

There have simply been no regulated contributions made by Respondents OFC, White, or Nashif in this matter. This complaint against these Respondents should be dismissed.

³ Such is the political crux of this entire case. Complainants are of course upset that non-supporters of Ralph Nader—religious conservatives and Republicans—would help Mr. Nader to get on the ballot in a state where many otherwise Democratic Party voters are likely to vote for him.

⁴ See discussion, Section II, *infra*.

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II. APPLYING THE CONTRIBUTION REGULATIONS TO OFC VOLUNTEER COMMUNICATIONS WITH ITS MEMBERSHIP WOULD VIOLATE THE FIRST AMENDMENT.

Assuming for the sake of argument that phone calls to OFC members by OFC itself and the efforts of the OFC volunteers could in some way be considered “contributions” under the statutory definitions of that term, imposing Section 441b prohibitions on such communications impermissibly burden the core political speech of OFC and its members.

The Supreme Court has held that the predecessor statute to 2 U.S.C. § 441b, which similarly governed corporate contributions in federal election campaigns, was implemented to limit the use of potentially vast stores of corporate or union funds to influence public at large (as opposed, for example, to union membership) to vote for particular candidate or particular party. *United States v. International Union United Auto., Aircraft and Agr. Implement Workers of America (UAW-CIO)*, 352 U.S. 567 (1957). However, in pursuit of this goal, the Court has noted that “the ‘potential for unfair deployment of wealth for political purposes’ [falls] short of justifying a ban on expenditures by [non-profit, membership groups that focus on political activism] that ‘do not pose that danger of corruption[.]’ ” *Federal Election Comm’n v. Beaumont*, 539 U.S. 146, 158 (2003), citing *MCFL*, 479 U.S. at 259.

In other words, non-profit advocacy corporations are exempt from regulation on expenditures under the First Amendment, because their limited resources do not pose a threat of corruption sufficient to override their right to free speech. Indeed, there is little danger that the Nader campaign will be held in thrall to the OFC—a conservative Christian advocacy group—by the appearance of less than 100 of its members at a rally to simply get Nader’s name on the Oregon ballot in the November 2004 election. OFC is certainly not advocating that its members “vote Nader” for president.

Because of the risk of stifling core political speech, and because the low danger of corruption posed by non-profit advocacy corporations, the Court held that Section 441b’s prohibitions on expenditures by non-profit advocacy corporations were unconstitutional. *MCFL*, 479 U.S. at 259.⁵ In *Beaumont*, the Court declined to extend *MCFL*’s exemption from Section 441b to non-profit corporation *contributions*. *Beaumont*, 539 U.S. at 159–60. In other words, under *Beaumont*, “direct contributions” by non-profit advocacy corporations can constitutionally be prohibited by Section 441b. *Id.* at 156, 163. Nonetheless, *Beaumont* is silent on “in-kind” contributions and “contributions” consisting of communications with a non-profit advocacy corporation’s own membership.

⁵ Therefore, if the phone calls and volunteer work are “expenditures” by OFC, the Constitution protects them to the fullest. Only through the rhetorical sleight of hand of terming these acts “contributions” does the Complainant find any basis for this complaint.

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Given the significant First Amendment concerns at issue, *Beaumont* does not apply to the present case because OFC did not make a "direct contribution" to the Nader campaign. OFC certainly did not advocate that its members vote for Nader in the general election. Conversely, the non-profit advocacy corporation in *Beaumont* had directly contributed cash raised by the corporation itself (and not a separate political action committee, or PAC) to federal candidates, and because of the financial resources of large non-profit advocacy corporations like the Sierra Club and the National Rifle Association, the Supreme Court held that direct contributions from non-profit advocacy corporations posed a similar threat of corruption to the federal election process as unregulated contributions from for-profit ventures. *Beaumont*, 539 U.S. at 159-60.

Conversely, if OFC "contributed" anything to the Nader campaign in this case, it was political speech with its members alone. OFC informed *only* its members of an important political event in Oregon. This is far from the regulation on direct cash payments held to be constitutional in *Beaumont*. There is no logical basis to extend *Beaumont* to "in-kind" "contributions" of phone calls to fellow advocacy group members informing them of a rally to place a candidate's name on a ballot—a candidate that the organization itself does not directly support—without running afoul of the core political purpose of information-dispensing non-profit advocacy corporations. OFC *exists* to inform its members about political happenings in the State of Oregon. That is all that OFC did here.

In fact, *Beaumont* was careful not to overrule *MCFL*. The distinction the Court drew between non-profit advocacy corporation expenditures in *MCFL* and non-profit advocacy corporation contributions in *Beaumont* hinged on the difference between money and speech. In justifying Section 441b's prohibition on non-profit advocacy corporation contributions, the *Beaumont* Court noted that non-profit advocacy corporations are still able to contribute money directly to candidates through a PAC, and:

The PAC option allows corporate political participation without the temptation to use *corporate funds* for political influence, quite possibly *at odds with the sentiments of some shareholders or members*.

Beaumont, 539 U.S. at 163 (emphasis added). Here, no corporate funds were expended. Speech is the purpose of a non-profit advocacy corporation, and because the entire process was volunteer-run and meant to secure a voluntary response to current political events, there was no risk of expenditures outside the wishes of those members who wished to participate.

Beaumont by its terms—"direct contribution"—does not apply to this case. Attempting to extend the logic of the case to the actions at issue here defies common sense and ultimately the Constitution itself. Assuming that the phone calls and volunteer time are "contributions" despite the statutory definitions of the term, and assuming the *Beaumont* prohibition on contributions carries over to in-kind contributions of phone calls to an organization's own members, there is

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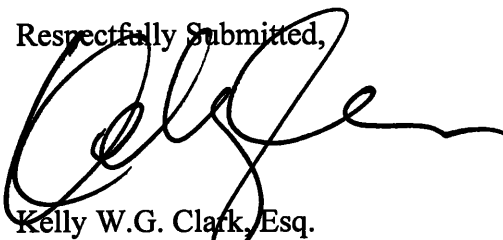
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still no logical or just reason for applying Section 441b's restrictions to intra-organizational speech. Such a policy would fly in the face of the protections on core political speech recognized by First Amendment

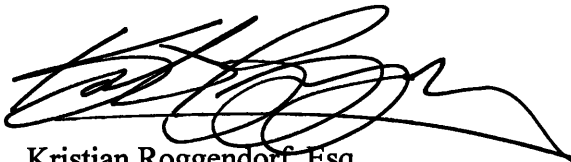
CONCLUSION

This complaint was brought against Respondents OFC, White, and Nashif based on second-hand reports of activities described in newspapers and periodicals. The actual facts of this case, as fully presented above, show that none of these Respondents engaged in any violation of United States election law. This complaint should be dismissed as to these Respondents.

Respectfully Submitted,



Kelly W.G. Clark, Esq.
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Kristian Roggendorf, Esq.
OSB #01399

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BEFORE THE FEDERAL ELECTION COMMISSION
OF THE UNITED STATES OF AMERICA

In the Matter of:

Case No. MUR 5475

Nader for President 2004;
Clarissa Peterson, Treasurer;
Oregon Citizens for a Sound Economy;
Russ Walker, Director;
Oregon Family Council;
Timothy Nashif, Staff;
Michael White, Staff;
Bush-Cheney '04;
David Herndon, Treasurer;
Steve Schmidt, Spokesman;
Oregon Republican Party;
Kevin Mannix, Chairman

DECLARATION OF MICHAEL
WHITE

I, Michael White, declare that the following is true and correct:

1. I am over 18 years of age, and if called as a witness I would testify competently and as set forth below.

2. I am the Executive Director for Oregon Family Council (OFC), a non-profit public benefit corporation, the organizational purpose of which is to inform Oregon Christians of significant political events and issues. OFC is not a membership organization, but it has a number of "members"—donors and activists who are kept informed of political developments of import to Oregon Christians. For purposes of this affidavit, I will refer to these donors as OFC "members."

3. On or about June 22, 2004, I was contacted by a representative from either Citizens for a Sound Economy to the Oregon Republican Party concerning attendance at the Nader rally scheduled for June 27, 2004. I cannot recall which of these two groups actually contacted me. I was out of town at the time and arranged with Nick Graham to inform our Portland, Oregon OFC

EXHIBIT 1
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1 members about the Nader rally.

2 4. I assisted Nick Graham with drafting a script for callers to read to the Portland OFC
3 members concerning the Nader rally.

4 5. I was not being paid for my time spent in participating in the above actions. I consider
5 my time spent in the above actions to have been volunteered for the benefit of OFC in order to
6 communicate important political news to OFC members.

7 I declare under penalty of perjury under the laws of the United States and the State of
8 Oregon that the foregoing is true and correct.

9 DATED this 9 day of August, 2004.

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12 Michael White
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BEFORE THE FEDERAL ELECTION COMMISSION
OF THE UNITED STATES OF AMERICA

In the Matter of:

Case No. MUR 5475

Nader for President 2004;
Clarissa Peterson, Treasurer;
Oregon Citizens for a Sound Economy;
Russ Walker, Director;
Oregon Family Council;
Timothy Nashif, Staff;
Michael White, Staff;
Bush-Cheney '04;
David Herndon, Treasurer;
Steve Schmidt, Spokesman;
Oregon Republican Party;
Kevin Mannix, Chairman.

DECLARATION OF NICHOLAS
GRAHAM

I, Nicholas Graham, declare that the following is true and correct:

1. I am over 18 years of age, and if called as a witness I would testify competently and as set forth below.

2. I am the Communications Director for Oregon Family Council (OFC), a non-profit public benefit corporation, the organizational purpose of which is to inform Oregon Christians of significant political events and issues. OFC is not a membership organization, but it has a number of "members"—donors and activists who are kept informed of political developments of import to Oregon Christians. For purposes of this affidavit, I will refer to these donors as OFC "members."

3. On or about June 22, 2004, I assisted Michael White in drafting a script used to inform OFC members of the Nader rally taking place on June 27, 2004. I also formatted the OFC donor list for input into the Gateway Communications, Inc. automated calling system to include only Portland, Oregon OFC members. All of the calls made the evening of June 22, 2004 had to

EXHIBIT

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originate from that list, and it would have been impossible for calls to be placed to other numbers using the Gateway Communications, Inc. phone system. This list was not made available to any outside party.

4. Approximately 100 calls were placed to Portland, Oregon OFC members on the evening of June 22, 2004, informing them of the upcoming Nader rally.

5. I was not being paid for my time spent in participating in the above actions. I consider my time spent in the above actions to have been volunteered for the benefit of OFC in order to communicate important political news to OFC members.

I declare under penalty of perjury under the laws of the United States and the State of Oregon that the foregoing is true and correct.

DATED this 10 day of August, 2004.



Nicholas Graham

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BEFORE THE FEDERAL ELECTION COMMISSION
OF THE UNITED STATES OF AMERICA

In the Matter of:

Case No. MUR 5475

Nader for President 2004;
Clarissa Peterson, Treasurer;
Oregon Citizens for a Sound Economy;
Russ Walker, Director;
Oregon Family Council;
Timothy Nashif, Staff;
Michael White, Staff;
Bush-Cheney '04;
David Herndon, Treasurer;
Steve Schmidt, Spokesman;
Oregon Republican Party;
Kevin Mannix, Chairman

DECLARATION OF TIM NASHIF

I, Tim Nashif, declare that the following is true and correct:

1. I am over 18 years of age, and if called as a witness I would testify competently and as set forth below.

2. I am the Political Director for Oregon Family Council (OFC), a non-profit public benefit corporation. This is a volunteer position.

3. On or about June 22, 2004, I was in Colorado, and while I approved of the informing of our members took no part in any organization or placing of any phone calls to OFC donors or activists.

I declare under penalty of perjury under the laws of the United States and the State of Oregon that the foregoing is true and correct.

DATED this _____ day of August, 2004.

[Signed copy forthcoming, declaration approved by declarant]
Tim Nashif